81-5330

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

NO. 94

THURMAN MARTIN, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

PETITIONER FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

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Thurman Martin,
Petitioner

v.

State of North Carolina
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

The Petitioner, Thurman Martin, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina affirming his conviction and sentence of death. The judgment of the Supreme Court of North Carolina was entered on June 2, 1981, in State of North Carolina v. Martin, No. 36.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____ NC _____, 278 SE 2d 214 (1981) and is attached hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court of North Carolina was filed on June 2, 1981. By operation of North Carolina law, an execution date of June 19, 1981, was thereafter established for the plaintiff. On the 10th day of June, 1981, however, the Supreme Court of North Carolina stayed petitioner's execution pending its further orders. On August 3, 1981, this Court, per Justice Warren E. Burger, granted petitioner's application for an Extension of Time to August 31, 1981, within which to file his petition for certiorari. (Appendix B). This Court's jurisdiction to review by writ of certiorari is invoked under 28 USC 1257 (3).

QUESTION PRESENTED

I. WHETHER THE TRIAL COURT COMMITTED ERROR DURING THE SENTENCING PHASE OF DEFENDANT'S FIRST DEGREE MURDER TRIAL IN INSTRUCTING THE JURY THAT IF IT WERE SATISFIED BEYOND A REASONABLE DOUBT THAT THE MURDER OF THE VICTIM WAS COMMITTED IN SUCH A MANNER AS TO BE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, THEY COULD CONSIDER THIS AS AN AGGRAVATING CIRCUMSTANCE IN DETERMINING WHETHER OR NOT TO RECOMMEND IMPOSITION OF THE DEATH PENALTY.

North Carolina General Statutes, Section 15A-2000(d) (2) provides that "the sentence of death shall be overturned, and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's finding of any aggravating circumstances upon which the sentencing court based its sentence of death".

The only aggravating circumstance which the Court instructed that the jury could find in this case was that of the crime being "especially heinous, atrocious or cruel." (R.P. 111). Defendant contends that the statute, North Carolina General Statute, Section 15A-2000(e) (d) which allows the death penalty to be imposed on the basis of such a circumstance, is unconstitutional; and that it fails to guide jury discretion in sentencing, thus violating both the Eighth and Fourteenth Amendment of the Constitution of the United States. Defendant, therefore, contends that the sentence of death was improperly imposed.

Gregg v. Georgia., 428 US 153,189 (1976) holds that since the time of the ruling in Furman v. Georgia., 408 US 238 (1972), the jury must be "...suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." A jury must be guided and channeled by a system that focuses on the circumstances of each individual homicide and each individual defendant in deciding whether the death penalty is to be imposed. Proffitt v. Florida., 428 US 242, 258 (1976).

Many states have attempted to comply with Furman's mandate by legislating statutory aggravating and mitigating circumstance, through which "the jury is given guidance regarding factors about the crime and the defendant that the state...deems particularly relevant to the sentencing decision." Gregg v. Georgia., supra 428 US 192. Even though North Carolina Legislature has provided statutory aggravating and mitigating circumstances to guide the jury, it is the construction given these statutes by the State Courts which is critical in determining whether such circumstances provide the guidance as required.

The North Carolina Statute adopts the model of the Georgia statute approved in Gregg, but the statute fails to give adequate guidelines. The statute allows broad interpretation such as was seen in the petitioner's case, and has, in effect, resulted in a unrestrained, unguided sentencing discretion.

At the trial, prosecution presented testimony that on July 5, 1979, at about 12:15 a.m., the victim entered the Hulon apartment followed by the defendant who fired two shots, causing the victim to fall to her knees; that thereafter, an eye-witness testified that he continued to strike the victim and shoot his wife for a period of some twenty-five minutes in the apartment; another eye-witness testified that she lived in the apartment where the shooting took place and observed some of what the other witness had testified to, and that she had fled to call the police. There was evidence presented that the defendant, after he shot the victim the first time, told her to get up; that she could not walk, and could not move; that thereafter, he continued to hit her several times in the face and about her body, while she called for help.

Defendant offered no evidence at the first phase of the trial and that the defendant did not testify on his own behalf. The trial judge submitted the possible verdicts of first degree murder, second degree murder, voluntary manslaughter, and not guilty. The jury found the defendant guilty of first degree murder and recommended at the punishment stage, the death penalty. It was during the punishment phase of the trial, that the Court instructed the jury that if it were satisfied from the evidence, beyond a reasonable doubt that the murder of the victim was committed in such a manner as to be especially heinous, atrocious, and cruel, that it could consider this as an aggravating circumstance in determining whether or not to recommend the imposition of the death penalty.

The question that arises, then, is what murder could not be seen as "conscienceless or pitiless" by a jury. The North Carolina Supreme Court has stated that the act of homicide itself is not enough to permit a jury to find such a killing as "heinous, atrocious, or cruel." State v. Goodman, 298 NC at 25, 257 SE 2d at 585. The real discretion of the jury is left unguided, unrestrained. Although the Court may give specific instructions as to what is "heinous, atrocious, or cruel," as was done in this case (R p 111), the jury still can find any murder it wants to as "heinous, atrocious, or cruel," if it subjectively thinks a murder is such. In State v. Barfield, 298 NC 306, 353, 359, SE 2d 510 543 (1979), the North Carolina Supreme Court stated that "jurors who are sitting in a criminal trial ought to be capable of understanding...the issues...and applying them when they are given appropriate instruc-

tions by the trial Court Judge." See Jurek v. Texas, 428 US 262, 279 96 S Ct 2950, 49 L Ed 2d 929, 939, (white, J., concurring)." Yet, no matter how such an instruction is given by a trial Court Judge, the jury's decision about such an aggravating circumstance will invariably be highly subjective and the result of unguided, uncontroll ble discretion; the type of discretion that has been outlaws since Furman v. Georgia, supra in 1972."

In the case at bar, the defendant, Thurman Martin, although he had a degree of calmness about him, was in a rage when he shot his wife, Peggy Lupo Martin. The defendant had no criminal record. He did not carry a gun to his wife's apartment but rather found a gun there after he arrived (R p 85). The defendant's wife, the deceased, had been out on a social engagement with another man, namely a deputy sheriff, on the night of the shooting, even though the defendant and his wife were not divorced (R p 38). The defendant did not remember anything beyond when he first started shooting the deceased (R p 85). But even though the defendant was of such a mind that he later could not remember what happened thereafter, the jury was given such broad discretion that it still found the murder "especially heinous, atrocious, or cruel." In State v. Barfield, supra, the North Carolina Supreme Court upheld this aggravating circumstance. The defendant was concious of what she was doing. She not only poisoned her victim, but she also intentionally let him suffer for over seventy-five (75) hours. She poisoned him twice in one afternoon, caused him to be in constant pain as he was plagued with nausea and disarrhea, let him be taken to the hospital twice, and intentionally did not explain to the medical personnel what cuased his sickness. In State v. Barfield, supra, the defendant had also murdered four other persons by poisoning them under the pretense of love. She repeatedly lied and covered up her dasterdly deeds, lying both to the victim's physicians and family.

By contrast, the case at bar, the defendant, Thurman Martin, did not execute a carefully designed plan, nor did he calmly execute his act. He found himself embroiled in a domestic dispute and collapsing marriage. He killed his wife because of uncontrollable emotion. The defendant's statement itself revealed that he did not remember what happened after he first stated shooting (R p 85).

As Justice Stewart stated in Gregg v. Georgia., 428 US at 193, and quoted by the North Carolina Supreme Court in State v. Barfield, 298 NC at 353, 259 SE 2d at 543, "it is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. As is graphically shown by contrasting the actions of the defendant in State v. Barfield, supra, with the actions of the defendant in the case at bar, a jury can see both murders as "heinous, atrocious, or cruel" even

even though one involved the carefully planned, deliberate, and deceitful scheme of poisoning, while the other involved a fit of anger as a result of domestic problems between a man separated from his wife. Any murder can be seen as conscienceless, pitiless, and unnecessarily torturious to the victim. The jury should be given more guidance than the broadly defined and subjectively used words "heinous, atrocious, or cruel." State Supreme Courts are rquired to "assure consistency, fairness, and rationality in the evenhanded operation of State Law." Proffitt v. Florida., 428 US at 260. With the present usage of such an instruction for aggravating circumstance, the jury cannot have unguided and unrestrained discretion, the type of discretion forbidden by the United State Supreme Court rulings and the Eighth and Fourteenth Amendments of the United States Constitution.

The North Carolina Supreme Court affirmed Petitioner's conviction and death sentence, expressly finding that the "evidence of the State tends to show that the brutality of the manner in which the defendant murdered his wife exceeded that which is normally present in any killing, in that it was unnecessarily torturious to her..." State v. Martin _____ NC _____ 278, SE 2d 214, 218 (1981).

REASONS FOR GRANTING THE WRIT

I. BY APPROVING A BROAD INTERPRETATION OF THE SPECIFIC AGGRAVATING CIRCUMSTANCE, THE NORTH CAROLINA SUPREME COURT HAS SANCTIONED CAPITAL SENTENCING PROCEDURES WHICH FAIL TO GUIDE JURY DISCRETION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUION.

The requirement that the discretion of the sentencing authority in a capital case, "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." as set forth in Furman v. Georgia, 408 US 238 (1972), Gregg v. Georgia, 428 US 153, 189 (1976). In order to accomplish this, the discretion of the sentencing authority must be "guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." Proffitt v. Florida, 428 US 24, 258 (1976). Only in such circumstances as the discretion is so specific and focused upon the distinct and important elements of that particular homicide and that particular defendant, is it suitably free from capriciousness and therefore allowed by the Eighth and Fourteenth Amendments.

In North Carolina, the responsibility of the State's Supreme Court to act in a guiding role to review the aggravating circumstances instructed and found in each case in which a death sentence has been imposed is set forth by North Carolina General Statutes, Section 15A-2000(d)(2). Even though the North Carolina Supreme Court has

had several death penalty cases before it, at this point, the Court seems still not to have exercised its duty in this respect.

At Petitioner's trial, the only aggravating circumstance submitted to the jury was that the murder was "especially heinous, atrocious, or cruel."

At Page Nineteen of the Court's Opinion as reported in State v. Martin 278 SE 2d 214, the Court admitted that sentencing standards are general in nature, and thereafter, in its opinion, eluded to the fact that some specificity was required, yet the Court failed to give specifics and simply held that the aggravating circumstances as embodied in North Carolina General Statutes, Section 15A-2000 (e) (9) is not unconstitutionally vague.

Probably of greater importance to the defendant is the fact that General Statutes, Section 15A-2000 (d) directs the State's Supreme Court to review the record in a capital case to determine whether the records supports the jury's findings of any aggravating circumstance, whether the sentence was imposed under the influence of passion, and whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Thereafter, the Court simply stated that it had conducted such a review and that it found this particular case not to be disproportionate to the penalties imposed in similar cases. No guidelines were given, no comparisons were made, and no indication was given as to what might be the basis upon which the Court made its decision.

In summary, the North Carolina Supreme Court's approval of impermissibly broad construction of the aggravating circumstances in petitioner's case has sanctioned the imposition of petitioner's death sentence through a sentencing process in which there is, in effect, no guidelines. Not only does this impose great hardship on the defendant, but gives no guidelines for future cases.

CONCLUSION

For the reasons set forth above, petitioner, Thurman Martin, respectfully urges this Court to grant his petition for a writ of certiorari to the Supreme Court of North Carolina.

Dated: August 31, 1981

Respectfully submitted,

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COUNSEL FOR PETITIONER

Supreme Court of the United States

No. A-94

THURMAN MARTIN,

Petitioner

v.

NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(~~s~~),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 31, 19 81.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 3rd
day of August, 19 81.

IN THE SUPREME COURT OF NORTH CAROLINA SPRING TERM 1981

STATE OF NORTH CAROLINA)
)
v) No. 36 - Scotland
)
THURMAN MARTIN)

FILED
JUN 2 1981
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

Appeal by defendant from judgment of Rouse, J., entered at the 11 February 1980 Criminal Session of Scotland Superior Court.

By an indictment proper in form, defendant was charged with the first-degree murder of his wife, Peggy Lupo Martin. He entered a plea of not guilty, and the state presented evidence summarized in pertinent part as follows:

On 5 July 1979, the date of the alleged murder, defendant and Peggy Lupo Martin were husband and wife, but they had been living separate and apart since August 1978. The couple's two small children lived with Mrs. Martin in an apartment in Laurinburg, North Carolina.

On 6 January 1979, defendant went to Mrs. Martin's resident and tampered with her automobile. Pursuant to a telephone call from Mrs. Martin, her friend Mrs. Gladys Grant and her husband went to the apartment to take Mrs. Martin and her children to her parents' home. While the Grants were trying to get Mrs. Martin and the children away from the apartment, defendant told Mrs. Martin: "Peggy, I'm going to kill you . . . I mean it. I'm going to kill you."

Prior to 4 July 1979, Mrs. Martin had dated Michael Bridges, a Scotland County deputy sheriff, three times. Deputy Bridges was divorced. They dated on 4 July 1979, and Deputy Bridges took Mrs. Martin home around midnight. After her companion left, Mrs. Martin drove to another part of Laurinburg to pick up her children at the home of a babysitter.

On 4 July 1979, Jackie Hulon lived in an apartment next door to that occupied by Mrs. Martin. Between 11:30 and 12:00 on that night he saw someone trying to enter a window of the Martin apartment. At about 12:15 a.m. he saw Mrs. Martin return to her apartment with her children. Several minutes later she ran up to the door of the Hulon apartment and sought entry. As Mr. Hulon admitted her, she stated that someone had been in her apartment and that her gun was missing.

Within a few moments, defendant, with a pistol in his hand, ran into the apartment. He fired two shots and Mrs. Martin fell to the floor. Defendant then ordered Hulon to sit down on the sofa. Thereafter, defendant struck Mrs. Martin several times with his hand, as well as the pistol, and shot her three more times. She died as a result of two shots that entered her head. (Additional details of the killing are hereinafter set out in the opinion.)

After emptying the pistol, defendant walked over to a coffee table, laid the gun down and said, "Well, I've done it." Meanwhile, police had arrived at the scene, and as defendant walked out the front door of the apartment, unarmed, officers arrested him.

Defendant offered no evidence at the guilt phase of the trial. The court charged the jury on possible verdicts of first-degree murder, second-degree murder, voluntary manslaughter and not guilty. The jury returned a verdict finding defendant guilty of murder in the first-degree.

At the sentencing phase of the trial, the state offered no additional evidence. The only evidence defendant presented was the testimony of his mother. She testified that defendant was one of ten children; that although he went to several schools, he was not able to learn; that he was unable to read or write; that he

was a nervous person and "if he would get upset, . . . he (would) just go all to pieces"; and that when he was a young boy, he tried to cut himself on several occasions during times of emotional distress.

The court submitted for consideration of the jury only one of the aggravating circumstances enumerated by G.S. § 15A-2000(e) (Cum. Supp. 1979): whether the murder was especially heinous, atrocious, or cruel. The jury found that the murder was especially heinous, atrocious, or cruel. With respect to mitigating circumstances, the jury found that the murder was not committed while defendant was under the influence of mental or emotional disturbance; that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was not impaired; and that there were no other circumstances which the jury deemed to have mitigating value.

The jury also found beyond a reasonable doubt that the aggravating circumstance found by them outweighed the mitigating circumstances; and that the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty. They unanimously recommended to the court that the defendant be sentenced to death.

Pursuant to the verdict and the sentence recommendation of the jury, the court entered judgment imposing the death penalty. Defendant appealed to this court pursuant to G.S. § 7A-27(a)(1969).

Attorney General Rufus L. Edmisten, by Assistant Attorney General Donald W. Stephens and Assistant Attorney General James C. Gulick, for the state.

Bruce W. Huggins for defendant-appellant.

BRITT, Justice.

PHASE I - GUILT DETERMINATION

Although defendant has assigned no error to this phase of his trial, due to the seriousness of the offense and the severity of the punishment, we have carefully reviewed the record of the pretrial, as well as the trial, proceedings.[1]

Murder in the first-degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. § 14-17 (Cum.Supp. 1979); e.g., State v. Fleming, 296 N.C. 559, 251 S.E. 2d 430 (1979). Apropos to this case is the following statement by Justice (later Chief Justice) Sharp in State v. Moore, 275 N.C. 198, 206, 166 S.E. 2d 652, 657 (1969):

> If defendant resolved in his mind a fixed purpose to kill his wife and thereafter, because of that previously formed intention, and not because of any legal provocation on her part, he deliberately and intentionally shot her, the three essential elements of murder in the first-degree -- premeditation, deliberation, and malice -- concurred.

The evidence presented by the state in the case sub judice is more than sufficient to support the jury's verdict of first-degree murder. The statements made by defendant to his wife in January prior to the killing in July are of particular importance. At that time he told her twice that he was going to kill her and that "I mean it". The evidence showed that he carried out that

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[1] The record reveals that on 12 September 1979 the court ordered that defendant be committed to Dorothea Dix Hospital at Raleigh for a determination with respect to his mental condition. On 2 October 1979, a report (dated 26 September 1979) from Dr. Bob Rollins, forensic psychiatrist, was filed with the court. In his report, based on interviews with defendant, observations of his ward behavior, and contacts with his attorney and the arresting officer, Dr. Rollins concluded that although defendant scored only 73 on the Slossen Intelligence Test, "clinically he appears to function in the average range of intelligence"; that his reading is at the 3.9 grade level; that his relatively low I.Q. score is the result of social and educational deprivation; and that "Mr. Martin is capable of proceeding to trial in that he has an understanding of his legal situation and is able to cooperate with his attorney. At the time of the alleged crime he may have been intoxicated to some degree."

determination some six months later in a most brutal manner.

We conclude that there was no error in the guilt determination phase of defendant's trial.

PHASE II - SENTENCE DETERMINATION

By his only assignment of error, defendant contends that the trial court erred in instructing the jury that if they found the murder of Mrs. Martin to be especially heinous, atrocious or cruel that this would be an aggravating circumstance which would permit them to recommend the imposition of the death penalty. We find no merit in the assignment.

A.

First, defendant argues that the evidence in this case was insufficient to establish that the murder was especially heinous, atrocious, or cruel within the contemplation of G.S. § 15A-2000(e)(9) as interpreted by previous decisions of this court, and he cites State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979).

In State v. Goodman, supra, the first of our cases to be decided under our new capital sentencing procedure, this court said:

> G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the 'capital felony was especially heinous, atrocious, or cruel.' While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. State v. Stewart, supra; State v. Rust, supra; State v. Simants, 197 Neb. 549, 250 N.W. 2d 881, cert. denied, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158 (1977).

> The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974); see also, State v. Alford, 307 So. 2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. State v. Rust, supra; Riley v. State, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will not become a 'catch all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances. Harris v. State, 237 Ga. 718, 230 S.E. 2d 1 (1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed. 2d 251 (1977).

298 N.C. at 24-25, 257 S.E. 2d at 585.

We now turn to a brief review of the evidence which relates to the details of the killing at hand. An eyewitness, Jackie Hulon, testified that immediately after defendant ran into the Hulon apartment, he fired two shots and Mrs. Martin "slumped down and fell" to her knees; that defendant told her to get up; that she told defendant she could not walk; that she could not move her legs; that defendant then went to her, placed his right hand around her waist and dragged her across the room into a small hallway; that he then held her up with his left hand and hit her four or five times with the pistol; that he thereafter slung her against the wall and hit her several times in her face with the pistol; that he told her he ought to kill her and she begged him not to hit her anymore; that he then slung her against the wall in the hall and hit her on her head five or six times with his fist; that while he was beating her in the hall, two shots were fired but they did not appear to strike Mrs. Martin; that thereafter, while she was down on the floor, defendant fired

another shot down toward the floor; that her small son then entered the apartment, calling his "Mama" at which time defendant fired another shot toward the floor; that she told the little boy to leave and he left the apartment crying; that she continued to plead for her life and asking defendant to forgive her; that she asked that someone call an ambulance because she was dying; that defendant then said, "I hope he does, I'll blow his g.d. brains out"; that defendant then fired three more shots at Mrs. Martin and "clicked" the gun five more times at her; and that thereafter he laid the gun on a table and said, "Well, I've done it". Approximately twenty to twenty-five minutes elapsed between the time Mrs. Martin entered the Hulon apartment and defendant laid the gun on the table.

A post-mortem examination revealed that Mrs. Martin received six gunshot wounds, three to her head, two to her body, and one to her elbow. It was the opinion of the pathologist that one of the first bullets that wounded Mrs. Martin severed her spinal cord and caused immediate paralysis and that either of the two bullets which entered her head would have caused instant death.

Clearly, the evidence for the state tends to show that the brutality of the manner in which defendant murdered his wife exceeded that which is normally present in any killing in that it was unnecessarily tortuous to her, not only from a physical standpoint, but also from a psychological one as well. Defendant did not murder his wife in a quick and efficient manner. Instead, he repeatedly shot her over a twenty-five minute period. Not until one of the final two shots were fired was she killed. Until that moment, she was physically abused by him in that she was dragged across the apartment of a neighbor in a state of helpless paralysis only to receive further physical abuse in the

form of being beaten by defendant, not only with his fists but also with the murder weapon. Throughout the episode, defendant's wife begged for her life, knowing that she could not escape because of her initial wounds. At one point, the couple's four-year-old child came into the room calling for his mother. Defendant fired another round at his wife in the presence of the child. At that point, Mrs. Martin told the child to leave, and the youngster fled out the front door crying. It cannot be argued that this evidence fails to establish a conscienceless or pitiless crime which was committed in disregard for the life of another. Compare State v. Oliver and Moore, 301 N.C.____, 274 S.E. 2d 183 (1981); State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286 (1980).

B.

Second, defendant contends that G.S. § 15A-2000(e)(9) is unconstitutionally vague in that it fails to guide the discretion of the jury at the sentencing phase of the trial. We disagree with this contention.

While it is settled that capital punishment is not invariably cruel and unusual punishment within the meaning of the eighth amendment, Gregg v. Georgia, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S. Ct. 2902 (1976); State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), cert. denied, ___ U.S. ___ (1980), it remains the law that those states which choose to extract the penalty of death for specified offenses must not impose the ultimate sanction under sentencing procedures which create a substantial risk that it will be imposed in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238, 253, 33 L.Ed. 2d 346, 357, 92 S.Ct. 2726, 2734 (1972) (Douglas, J., concurring); compare Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed. 2d 398, 100 S.Ct. 1759 (1980); Gregg v. Georgia, 428 U.S. at 189, 49 L.Ed. 2d at 883, 96 S.Ct. at 2932. In other

words, because the nature of a sentence of death is qualitatively different from that of any other punishment option which is available to the state, due process requires that the procedure under which such punishment is pronounced must provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 313, 33 L.Ed. 2d at 392, 92 S.Ct. at 2764 (White, J., concurring).

While a jury is not likely to be skilled as a body in handling the information which is brought before it at the sentencing phase of the procedure which is contemplated by North Carolina's scheme for trial of capital offenses, its lack of expertise can be overcome if the jury is given sufficient guidance concerning the relevant factors about the defendant and the crime which he was found to have committed. State v. Barfield, 298 N.C. at 352-353, 259 S.E. 2d at 543. Such guidance allows the jury which is impaneled to consider on the basis of all the relevant evidence not only why the death penalty should be imposed in a given case but also why it should not be imposed. Id.

Sentencing standards are, by necessity, somewhat general in nature. As we noted in Barfield, "while they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction." Id. It was our conclusion in Barfield that the issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning which jurors sitting in a criminal trial ought to be capable of understanding and applying when they are given

suitable instructions by the trial judge.

On its face, G.S. § 15A-2000(e)(9) is clearly general in nature. However, it is not impermissibly so when it is applied in light of the construction which this court has applied to it in State v. Goodman, supra. As we noted earlier, in Goodman we held that the aggravating circumstance of "especially heinous, atrocious, or cruel" requires that there be evidence that the murder in question involved brutality in excess of that which is normally present in any killing. In so holding we foreclosed any suggestion that G.S. § 15A-2000(e)(9) could be employed as a "catchall" provision which could be submitted when there is no evidence of other aggravating circumstances. In Goodman, we did not rely upon the canons of statutory construction alone. Instead, we also drew upon the decisions of the Florida Supreme Court in construing a provision of that state's capital punishment statutes whose language is identical to that of G.S. § 15A-2000(e)(9). In State v. Dixon, 283 So. 2d 1 (1973), the Florida Supreme Court interpreted the intent of its legislature in the words "especially heinous, atrocious, or cruel" to authorize the imposition of the death penalty based upon this factor only in those situations where the evidence showed that the murder was committed in such a way as to amount to a conscienceless or pitiless crime which is unnecessarily torturous to the victim. That construction was singled out for consideration by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 2960 (1976), wherein it upheld the constitutionality of the procedure by which the Florida courts imposed the death penalty. In his opinion, Mr. Justice Powell observed that, "[W]e cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-256, 49 L.Ed. 2d at

925, 96 S.Ct. at 2968. Because of the identical language which is utilized in the North Carolina and Florida statutes, as well as the similar construction placed upon that language by this court, as well as by the Florida Supreme Court, we hold that the aggravating circumstance embodied in G.S. § 15A-2000(e)(9) is not unconstitutionally vague.

C.

As a check against the capricious or random imposition of the death penalty, G.S. § 15A-2000(d) directs this court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See State v. McDowell, supra; State v. Barfield, supra.

Our review function in this regard should be employed only in those instances where both phases of the trial of a defendant in a capital case have been found to be without error. State v. Goodman, 298 N.C. at 35, 257 S.E. 2d at 590-591. In exercising our role in the statutory scheme, we must be sensitive not only to the mandate of the legislature but also to the constitutional dimensions of our review. See Gregg v. Georgia, 428 U.S. at 204-206, 49 L.Ed. 2d at 892-893, 96 S. Ct. at 2939-2940; Proffitt v. Florida, 428 U.S. at 258-259, 49 L.Ed. 2d at 926-927, 96 S.Ct. at 2969-2970.

We repeat what we said in Barfield: "We do not take lightly the responsibility imposed on us by G.S. § 15A-2000(d)(2)." 298 N.C. at 354, 259 S.E. 2d at 544. Consequently, we have meticulously reviewed the record in this case. We have carefully considered the briefs and arguments which have been presented to us.

After full deliberation, we conclude that there is sufficient evidence in the record to support the jury's finding as to the aggravating circumstance which was submitted to it. We find nothing in the record which would indicate that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

The brutal manner in which death was inflicted, which followed defendant's declaration approximately six months previously that he was going to kill his wife, leads us to conclude that the sentence of death is not excessive or disproportionate, considering both the crime and the defendant. We, therefore, decline to exercise our discretion to set aside the sentence imposed.

No error.

STATUTORY PROVISIONS

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. --

(a) Separate Proceedings on Issue of Penalty. --

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. -- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which

outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. -- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. --

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. -- Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, or a sex offense, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. -- Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(5) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c.406, s. 2.)

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NO. 81-5336

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THURMAN MARTIN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

WHETHER THE TRIAL COURT COMMITTED ERROR DURING THE SENTENCING PHASE OF DEFENDANT'S FIRST DEGREE MURDER TRIAL IN INSTRUCTING THE JURY THAT IF IT WERE SATISFIED BEYOND A REASONABLE DOUBT THAT THE MURDER OF THE VICTIM WAS COMMITTED IN SUCH A MANNER AS TO BE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, THEY COULD CONSIDER THIS AS AN AGGRAVATING CIRCUMSTANCE IN DETERMINING WHETHER OR NOT TO RECOMMEND IMPOSITION OF THE DEATH PENALTY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-5336

THURMAN MARTIN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of Thurman Martin and prays that this Court deny such petition on the basis of the facts and the authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Robeson County, North Carolina. In an opinion reported in State v. Martin, 303 N.C. 246, 278 S.E. 2d 214 (1981), the Supreme Court of North Carolina found no error and affirmed the judgment of death.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER THE TRIAL COURT COMMITTED ERROR DURING THE SENTENCING PHASE OF DEFENDANT'S FIRST DEGREE MURDER TRIAL IN INSTRUCTING THE JURY THAT IF IT WERE SATISFIED BEYOND A REASONABLE DOUBT THAT THE MURDER OF THE VICTIM WAS COMMITTED IN SUCH A MANNER AS TO BE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, THEY COULD CONSIDER THIS AS AN AGGRAVATING CIRCUMSTANCE IN DETERMINING WHETHER OR NOT TO RECOMMEND IMPOSITION OF THE DEATH PENALTY.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17 . . . A murder which shall be perpetrated by means of poison, lying in wait,

imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery,kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."

§15A-2000 [See Appendix C of Petitioner's Petition for Writ of Certiorari.]

STATEMENT OF CASE

The evidence of record from the testimony of eyewitnesses shows that on the evening of her death, July 4, 1979, Peggy Lupo Martin was legally married to the defendant, but had been separated from him since August of 1978. There were two children of the marriage, over which she had custody. On January 6, 1979, witnesses were present when the defendant told Peggy Martin that he intended to kill her. (R.p. 36)* The defendant on that occasion ran her vehicle off the road with his car. On July 4, 1979, the victim ran to a neighbor's house late in the evening, complaining that someone was in her apartment. Before either the neighbor or the victim could do anything, the defendant came into the neighbor's apartment with a revolver. He immediately shot Peggy Martin twice. (R.p. 41) She slumped to her knees and the defendant ordered her to get up. Peggy Martin responded, "I can't walk. I can't move my legs." (R.p. 42) He thereafter carried and dragged her approximately 20 feet across the room. He then, according to a witness, ". . . started beating her. I think he hit her four or five times with the pistol." "He slung her against the wall, . . ." (R.p. 42) The witness further testified that he hit her "right in the face" with the pistol four or five times.

[*R.p. indicates page number of Record on Appeal where the testimony can be located.]

The defendant was heard to say, "If I kill you, you know where you're going; don't you?" (R.p. 43) Peggy Martin was heard to plead and beg for her life. Thereafter, two more shots were fired by the defendant at Peggy Martin while she was pleading for her life. She was heard to say, "Please forgive me. I'm dying. I'm dying." (R.p. 45) She also said, "Please help me. I'm dying." The defendant thereafter fired the last three shots and "clicked the gun approximately five times"; he then said, "Well, I've done it." (R.p. 45) Approximately twenty-five minutes elapsed from the time Peggy Martin first entered the neighbor's apartment seeking help until the time the defendant clicked the empty gun the last time. "In relation to the last three shots, approximately five, five to seven minutes elapsed from the last time I heard Peggy Martin make a statement until I heard the last three shots," a witness testified. (R.p. 46) A forensic pathologist testified that Peggy Martin suffered six gunshot wounds to the forehead, cheek, right ear, abdomen, middle back and right elbow. It was the opinion of the pathologist that the gunshot wounds to the forehead and right ear, which entered the skull and the brain, were both fatal and that the victim would have died instantly from either. It was also the opinion of the forensic pathologist that the gunshot wound to the middle back, which severed the spinal cord, paralyzed the victim from the navel down and rendered her unable to move the lower portion of her body. (R.pp. 72-77) Thus, it is clear from this evidence that the victim was first paralyzed from the waist down by one of the initial two shots which the defendant fired during the first phase of this twenty-minute period; thereafter, the victim was shot with a grazing wound to the cheek and a wound to the abdomen which skirted the rib cage, and a wound to the right elbow, which bullet passed through the forearm and lodged into the wrist. Of the final three shots, one bullet entered the forehead and another entered the right ear, with both causing death.

After the guilty verdict, the presentation of the defendant's evidence relevant to sentencing, and the arguments of counsel, the trial court charged the jurors concerning sentencing and presented them with several issues relating to sentencing which were answered by them as follows:

"1. Do you find beyond a reasonable doubt that the following aggravating circumstance exists?

(a) The murder of Peggie Lupo Martin was especially heinous, atrocious or cruel.

ANSWER: Yes

2. Do you find that one or more of the following mitigating circumstances exist?

(a) The murder was committed while the defendant Thurman Martin was under the influence of mental or emotional disturbance.

ANSWER: No

(b) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired.

ANSWER: No

(c) Other circumstances which the jury deems to have mitigating value.

No

3. Do you find beyond a reasonable doubt that the aggravating circumstance found by you outweighs the mitigating circumstances found by you?

ANSWER: Yes

4. Do you find beyond a reasonable doubt that the aggravating circumstance is sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes

s/ Gene O. Thomas, Jr.
Foreman

WE, THE JURY, BASED UPON THE ANSWERS TO THE ABOVE ISSUES, AND AS EVIDENCED BY THE SIGNATURE OF THE UNDERSIGNED FOREMAN OF THE JURY, UNANIMOUSLY RECOMMEND TO THE COURT THAT THE PUNISHMENT FOR THE DEFENDANT, THURMAN MARTIN, BE DEATH.

This the 14 day of February, 1980.

s/ Gene O. Thomas, Jr.
FOREMAN OF THE JURY."

(R.pp. 120-121)

The defendant appealed his conviction and sentence to the North Carolina Supreme Court. That Court found no error. A further summary of the facts can be found as set forth in the opinion of the Court in State v. Martin, 303 N.C. 246 , 278 S.E. 2d 214 (1981), a copy of which is attached to the Petition for Writ of Certiorari as Appendix B.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The defendant in his Petition raises a single legal issue concerning the constitutionality of G.S. §15A-2000, alleging that the aggravating circumstance of the commission of a capital offense in a manner which is especially heinous, atrocious or cruel lacks sufficient specificity to guide the jury in making responsible death recommendations which will assure consistency, fairness and restrained discretion. However, this legal issue raises three significant questions as applied to this case. They are as follows:

I. Is G.S. §15A-2000(e)(9) unconstitutional in that it will allow the imposition of the death penalty on the basis of the aggravating circumstance that the capital felony was "especially heinous, atrocious, or cruel," without any further language in the statute to guide jury discretion?

II. Did the charge of the trial court during phase two of the trial adequately advise and explain to the jury this aggravating circumstance such that jury discretion in recommending sentence was properly restricted and guided thereby?

III. Is the evidence of record sufficient to support the jury's finding of this aggravating circumstance upon which the sentence of death was based?

QUESTION NUMBER I

IS N.C. G.S. §15A-2000(e)(9) CONSTITUTIONAL AS WRITTEN?

This precise legal question has been raised and answered adversely to the defendant by both the United States Supreme Court and the North Carolina Supreme Court. Construing an identical provision of the Florida statutes ["especially heinous, atrocious or cruel" -- Fla. Stat. Ann. §921.141(5)(h)] as an aggravating circumstance in a capital case, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976), found such provision to be constitutional in light of the fact that the Florida Supreme Court had carefully interpreted the precise meaning and extent of that language. In State v. Dixon, 283 So. 2d 1 (1973), the Florida Supreme Court had interpreted the intent of the legislature in the words "especially heinous, atrocious or cruel" to authorize the imposition of the death penalty, based on this factor, only under situations where the evidence showed the murder was committed in such a way as to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." [State v. Dixon, 283 So. 2d at 9; Proffitt v. Florida, 49 L. Ed. 2d at 924.] In Proffitt the Court found that this aggravating circumstance, as construed, interpreted and limited by the Florida Supreme Court in Dixon, was constitutional. The Court therefore concluded "we cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." [Proffitt v. Florida, 49 L. Ed. 2d at 925.]

The North Carolina Legislature, in seeking to enact an appropriate constitutional statute for the trial of capital

cases, enacted G.S. 15A-2000(e)(9) which adopts the identical language of the Florida statute. The North Carolina Supreme Court has adopted an identical construction of that language as that expressed by the Florida Supreme Court in State v. Dixon, supra. In State v. Goodman, 298 N.C. 1, 24, 257 S.E. 2d 569 (1979), the Court indicated the following:

> "G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the 'capital felony was especially heinous, atrocious, or cruel.' While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. State v. Stewart, supra; State v. Rust, supra; State v. Simants, 197 Neb. 549, 250 N.W. 2d 881, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977).
>
> The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974); see also, State v. Alford, 307 So. 2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. State v. Rust, supra; Riley v. State, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will not become a 'catch all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances. Harris v. State, 237 Ga. 718, 230 S.E. 2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977).
>
> In the case before us the court instructed as follows in his discussion of G.S. 15A-2000 (e)(9):
>
> > You are instructed that the words 'especially heinous, atrocious, or cruel' means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that 'heinous' means extremely wicked or shockingly evil.

> Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.
>
> We hold that this instruction is in accord with the construction of this subsection which we have adopted and that its submission to the jury was proper in light of the evidence in this case. The evidence reveals that decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality."

The North Carolina Supreme Court has, since Goodman, consistently interpreted and applied the provisions of G.S. §15A-2000(e)(9). In State v. Johnson, (I) 298 N.C. 47, 257 S.E. 2d 597 (1979), the Court repeated the aforesaid definition of the words "especially heinous, atrocious or cruel," indicating also that a defendant is entitled to an instruction upon his specific request "that not every murder is necessarily especially heinous, atrocious, or cruel." In State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979); State v. Johnson, (II) 298 N.C. 355, 259 S.E. 2d 752 (1979); State v. Detter, 298 N.C. 604, 260 S.E. 2d 567 (1979); State v. Jones, 299 N.C. 298, 261 S.E. 2d 860 (1980); State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286 (1980); State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981); and State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981), the North Carolina Supreme Court has consistently applied and interpreted G.S. §15A-2000(e)(9) with Goodman and with Dixon. Therefore, with respect to this legal issue raised in the defendant's appeal, such issue has been answered adversely to the defendant previously and can best be summarized adversely to him by the words of Justice Exum, speaking for the North Carolina Supreme Court, in State v. Johnson, (I), 298 N.C. 47

at page 81 (1979):

> "We held in State v. Goodman, supra, 298 N.C. 1, 257 S.E. 2d 569, that the aggravating circumstance listed in G.S. 15A-2000(e)(9) was not intended to be a 'catchall' provision which can always be employed in cases where there is no evidence of other aggravating circumstances and that 'this subsection is [not] intended to apply to every homicide.' We adopted in Goodman Florida's construction of a similar provision in its death penalty statute. By interpreting its comparable section to be directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,' State v. Dickson, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), the Florida Supreme Court provided a construction which enabled the United States Supreme Court to hold that the provision, as construed, was not unconstitutionally vague or overbroad and gave sufficient 'guidance to those charged with the duty of recommending or imposing sentences in capital cases.' Proffitt v. Florida, supra, 428 U.S. at 256. The trial judge defined this aggravating circumstance precisely in accord with definitions approved by the Florida Supreme Court in Dickson, the United States Supreme Court in Proffitt, and this Court in Goodman."

Based upon the foregoing, it is the opinion of the Attorney General of North Carolina that this legal question raised by the Petitioner in this Court has been previously passed upon by this Court in a manner adverse to the Petitioner. The decision of this Court in Proffitt v. Florida, supra, has previously resolved this legal issue in favor of the constitutionality of an identical statutory provision. Therefore, the Petitioner's challenge is without merit.

QUESTION NUMBER II

DID THE TRIAL COURT CORRECTLY DEFINE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" IN ITS CHARGE TO THE JURY?

In defining to the jury the aggravating circumstance of "especially heinous, atrocious or cruel", the trial court made the following instruction to the jury:

> "Not every murder is necessarily especially heinous, atrocious or cruel, in the sense that these words are used in the statute. You are instructed that the words 'especially heinous, atrocious or cruel,' as used here,

> means extremely or especially, or particularly heinous or atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty marked by extreme violence or savagely fierce. It means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others. For a murder to have been especially heinous, especially atrocious or especially cruel, it must have been a conscienceless or pitiless crime which is unnecessarily torturous to the victim." [R.p. 111]

This is the precise definition which was upheld by the North Carolina Supreme Court in State v. Goodman, supra [298 N.C. at 25]. In addition to the definition approved in Goodman, the trial court in its charge to the jury set forth above included the additional instructions approved in State v. Johnson, supra, [298 N.C. at 81], by informing the jury that "not every murder is necessarily especially heinous, atrocious or cruel, in the sense that these words are used in the statute." The court also added the additional language approved in Johnson in its instruction that for "a murder to have been especially heinous, especially atrocious or especially cruel, it must have been a conscienceless or pitiless crime which is unnecessarily torturous to the victim." [Johnson, 298 N.C. at 81]

Therefore, it is clear that the trial court did not deviate from the definitions approved by the North Carolina Supreme Court in jury instructions defining this aggravating circumstance under G.S. §15A-2000(e)(9). This charge included the identical words and the identical definitions of this aggravating circumstance previously set forth by that Court as proper and as sufficient. Wherefore, it is the opinion of the Attorney General that the trial court's instruction to the jury was adequate and sufficient as a matter of law. This charge gave clear guidance to the jury in limiting their discretion in the recommendation of a sentence. This is the precise definition approved by the Florida Supreme Court in State v. Dixon, supra, and which was found without constitutional

infirmity in Proffitt v. Florida, supra.

QUESTION NUMBER III

IS THERE SUFFICIENT EVIDENCE OF RECORD TO SUPPORT THE JURY'S FINDING THAT THIS CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL?

The evidence of record shows that on the evening of her death, July 4, 1979, Peggy Lupo Martin was legally married to the defendant, but had been separated from him since August of 1978. There were two children of the marriage, over which she had custody. On January 6, 1979, witnesses were present when the defendant told Peggy Martin that he intended to kill her. (R.p. 36) The defendant on that occasion ran her vehicle off the road with his car. On July 4, 1979, the victim ran to a neighbor's house late in the evening, complaining that someone was in her apartment. Before either the neighbor or the victim could do anything, the defendant came into the neighbor's apartment with a revolver. He immediately shot Peggy Martin twice. (R.p. 41) She slumped to her knees and the defendant ordered her to get up. Peggy Martin responded, "I can't walk. I can't move my legs." (R.p. 42) He thereafter carried and dragged her approximately 20 feet across the room. He then, according to a witness, ". . . started beating her. I think he hit her four or five times with the pistol." "He slung her against the wall, . . ." (R.p. 42) The witness further testified that he hit her "right in the face" with the pistol four or five times. The defendant was heard to say, "If I kill you, you know where you're going; don't you?" (R.p. 43) And Peggy Martin was heard to plead and beg for her life. Thereafter, two more shots were fired by the defendant at Peggy Martin while she was pleading for her life. She was heard to say, "Please forgive me. I'm dying. I'm dying." (R.p. 45) She also said, "Please help me. I'm dying." The defendant thereafter fired the last three shots and "clicked the gun approximately five times"; he then said, "well, I've

done it." (R.p. 45) Approximately twenty-five minutes elapsed from the time Peggy Martin first entered the neighbor's apartment seeking help until the time the defendant clicked the empty gun the last time. "In relation to the last three shots, approximately five, five to seven minutes elapsed from the last time I heard Peggy Martin make a statement until I heard the last three shots," a witness testified. (R.p. 46) A forensic pathologist testified that Peggy Martin suffered six gunshot wounds to the forehead, cheek, right ear, abdomen, middle back and right elbow. It was the opinion of the pathologist that the gunshot wounds to the forehead and right ear, which entered the skull and the brain, were both fatal and that the victim would have died instantly from either. It was also the opinion of the forensic pathologist that the gunshot wound to the middle back, which severed the spinal cord, paralyzed the victim from the navel down and rendered her unable to move the lower portion of her body. (R.pp. 72-77) Thus, it is clear from this evidence that the victim was first paralyzed from the waist down by one of the initial two shots which the defendant fired during the first phase of this twenty minute period; thereafter, the victim was shot with a grazing wound to the cheek and a wound to the abdomen which skirted the rib cage, and a wound to the right elbow, which bullet passed through the forearm and lodged into the wrist. Of the final three shots, one bullet entered the forehead and another entered the right ear, with both causing death.

It is the opinion of the Attorney General that the aforesaid evidence is substantial and is clearly sufficient to show that this capital felony, as committed, was especially heinous, atrocious and cruel. The defendant intentionally inflicted great pain and suffering with a total indifference to such pain and suffering, and with either pleasure in or the intent to cause great psychological and physical pain and suffering of the victim prior to death. This act was done without conscience

and was pitiless and unusually torturous to the victim. This is precisely the conduct which is addressed by G.S. 15A-2000 (e)(9) as discussed by the North Carolina Supreme Court in State v. Goodman, supra, and subsequent cases.

In State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979), the Court held, on the issue of the sufficiency of the evidence to support a finding of the aggravating circumstance of "especially heinous, atrocious or cruel", the following: "The evidence reveals that decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality." [298 N.C. at 26] In State v. Johnson, (I), 298 N.C. 47, 257 S.E. 2d 597 (1979), on this issue the Court made the following observation:

> "We are satisfied that the submission of this aggravating circumstance was proper in light of the evidence. It tended to show that defendant first tried to strangle his victim to death with a fish stringer. Upon rendering her unconscious, he sexually molested her. Then, realizing she was not dead, he stabbed her to death. Defendant's actions could have been found by the jury to be 'especially heinous, atrocious or cruel' within the meaning of the statute as we have construed it." [298 N.C. at 82]

It is clear from the opinions of the North Carolina Supreme Court in State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979) and State v. Detter, 298 N.C. 604, 260 S.E. 2d 567 (1979), that these arsenic poisoning cases sufficiently showed a wealth of evidence from which the jury could infer that the killings were especially heinous, atrocious and cruel. The evidence summarized in both opinions abundantly demonstrated the great pain and suffering of the victims and the protracted agony occasioned by their poisoning. In State v. Jones, 299 N.C. 298, 261 S.E.

2d 860 (1980), that Court noted that there was sufficient evidence of record to support a finding that the killing was especially heinous, atrocious and cruel from the manner in which the victim was clubbed to death. The evidence indicated that the victim was struck two or three times with a pipe, two and one-half inches in diameter. Thereafter, as the victim lay on the ground, the defendant obtained a hatchet and placed a piece of tablecloth over the victim's head and then struck the victim in the left temple three to five times with the back side of the hatchet.

In State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286 (1980), the Court upheld a jury finding of the aggravating circumstance of especially heinous, atrocious or cruel, where the evidence showed that two young girls were attacked by the defendant with a machete, and that the young four year old victim suffered nine wounds; six of these wounds were to her head, with three to her left arm and one on her right thumb and index finger, which had been severed at the joint. The Court found the evidence sufficient in McDowell to uphold the death verdict recommended by the jury and imposed by the court in that case.

In State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981), the Court again addressed the question of the sufficiency of the evidence to support the aggravating circumstance of especially heinous, atrocious or cruel. The case involved the shooting of a grocery store operator during the course of an armed robbery and the shooting of an innocent bystander outside who was putting gas in his car at the time. The defendants were convicted and sentenced to death for the killing of the store operator, Mr. Watts, and also for the killing of the individual outside, Mr. Hodge. This Court remanded the case for a new hearing on sentence with the following observation:

> "In the Watts murder cases, the State's evidence shows that Watts, after opening his cash register in response to defendants' demands, begged for his life. Watts said, 'please don't shoot me. Go ahead and take the money.' With Watts pleading for his life

defendant Moore, according to his evidence, mercilessly shot him to death. In our view, the jury could find from these circumstances that the murder of Watts was especially heinous, atrocious or cruel. This aggravating circumstance was appropriately submitted in the Watts cases. In the Hodge cases, however, the State's evidence tends to show that defendant Oliver, as he was running from the store, shot and killed Hodge, who had pulled up to purchase gas. Although Hodge was an innocent bystander, his murder by defendant Oliver was, according to the evidence, the product of a sudden act and death apparently was instantaneous. There was no unusual infliction of pain or suffering to the victim. The shooting was undoubtedly the result of Oliver's excitement and haste in his attempt to escape from crimes he had already committed. We can find nothing in the brutality of this killing which exceeds that normally present in a case of first degree murder.

Where it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of the defendant. When 'a person's life is at stake . . . the jury should not be instructed upon one of the [aggravating] statutory circumstances in a doubtful case.' State v. Goodman, supra, 298 N.C. at 30, 257 S.E. 2d at 588. We conclude, therefore, that the 'especially heinous' aggravating circumstance should not have been submitted in the Hodge murder cases." [Emphasis added]

In explaining this rationale in Oliver and Moore, the Court said:

"Defendants next contend that aggravating circumstance number four, i.e., that the murders were 'especially heinous, atrocious, or cruel' should not have been submitted. We conclude that this circumstance was properly submitted in the Watts, but not in the Hodge, murder case.

The meaning of this aggravating circumstance was fully considered in State v. Goodman, 298 N.C. 1, 24-26, 257 S.E. 2d 569, 585 (1979), where we said:

'While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection.'

In Goodman we adopted the Florida and Nebraska view that for this aggravating circumstance to

apply the murder must be a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim,' and we approved the following jury instruction:

> 'You are instructed that the words 'especially heinous, atrocious or cruel' means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that 'heinous' means extremely wicked or shockingly evil. 'Atrocious' means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.'

We noted in Goodman that by so limiting the application of this aggravating circumstance it would not become 'a catch all provision which can always be employed in cases where there is no evidence of other aggravating circumstances.' Id. at 26, 257 S.E. 2d at 585.

Several cases have concluded that certain kinds of murders could be 'especially heinous.' In Goodman the deceased was shot several times, cut repeatedly with a knife, placed in the trunk of a car where he remained alive for several hours and where his struggles to escape could be heard by his assailants who drove him to another county, took him from the car, placed him on the ground and shot him twice through the head. We concluded this murder was 'marked by extremely vicious brutality' calling for the application, if the jury so found, of the 'heinous, atrocious, or cruel' aggravating circumstance. We held in State v. Johnson, 298 N.C. 47, 257 S.E. 2d 597 (1979) that submission of this aggravating circumstance was proper where the defendant tried to strangle his victim to death and, upon rendering her unconscious, sexually molested her when, realizing she was not dead, then stabbed her until she died. A number of decisions from other jurisdictions have had occasion to consider whether particular murders could be 'especially heinous, atrocious, or cruel' under capital sentencing statutes similar to ours. At least one court has determined that the murder of one pleading for mercy may fall within the category of an 'especially heinous' offense. Lucas v. State, 376 So. 2d 1149 (Fla. 1979)."

The most recent case in which the North Carolina Supreme Court has had the opportunity to address this issue is State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981), where the Court addressed the trial judge's failure to submit the aggravating circumstance of especially heinous, atrocious and cruel.

After addressing its previous decisions and instructions in Goodman and other cases on this issue, the Court made the following statement:

> "Noting these principles and the cases in which the aggravating circumstance has been applied, we are satisfied that it could and should have been submitted in this case. The evidence tends to show that before she was murdered, Mary Jo Nancy Coates was stripped from the waist down. Her hands were tied behind her back, and her brassiere was tied around her neck. She was marched at knife point by her assailant into nearby woods where she was forced to lie on the ground. She was beaten before she was murdered. Clearly this murder constituted a 'conscienceless' and 'pitiless' crime which was 'unnecessarily torturous to the victim.' See State v. Goodman, supra. The jury could have found, had it been given the opportunity to do so, that the murder of Mary Jo Nancy Coates was especially heinous, atrocious, or cruel."

Likewise, the North Carolina Supreme Court has been quick to find error where there is too frequent a reliance on G.S. §15A-2000(e)(9) to extend a routine homicide into a capital crime. In State v. Hamlette, 302 N.C. 490, 276 S.E. 2d 338 (1981) the Court said:

> "According to the evidence in the present case, defendant, after riding around and drinking beer most of the evening, saw the victim and shot him three times from behind without any established motive and then fled. The victim lingered for twelve days and died from the gunshot wounds. This was heinous but not 'especially heinous' within the meaning of that term as used in the statute. In comparison with other capital cases we have decided, it was not unnecessarily torturous or outrageously wanton or vile. Contrast State v. Goodman, supra, and State v. Johnson, supra, with State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981). This aggravating circumstance should not have been submitted to the jury."

It is the opinion of the Attorney General, based upon the decisions of the North Carolina Supreme Court previously cited, that there was an abundance of evidence of record in this case to support the submission to the jury of this aggravating factor. It is also the opinion of the Attorney General that these decisions of the North Carolina Supreme Court previously cited have consistently interpreted and limited the meaning of G.S.

15A-2000(e)(9) in such a manner as to eliminate therefrom any ambiguity in its language. That statutory provision, as consistently interpreted by the North Carolina Supreme Court, is constitutional.

CONCLUSION

The Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari should be denied for he fails to set forth any meritorious basis upon which relief should be granted. North Carolina General Statutes §15A-2000(e)(9) is constitutional as interpreted and applied by the North Carolina Supreme Court. The Petitioner received a fair and impartial trial and was convicted upon overwhelming competent evidence. The sentence of death was imposed by a constitutionally acceptable procedure and such sentence is supported by the evidence. In this regard the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The sentence was imposed under an unambiguous statutory scheme which provides for limited and guided jury sentence recommendations which assure consistency, fairness and restrained discretion.

Respectfully submitted this the 21 day of September, 1981.

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